BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIE A. WIELAND Claimant	)	
VS.	)	
PHILLIPS COUNTY HOSPITAL Respondent	)	Docket Nos. 1,031,634 & 1,031,646
AND	)	
FIRST LIBERTY INSURANCE CORP. **KS. HOSPITAL ASSOC. WCF, INC.** Insurance Carriers	)	

ORDER

Respondent and First Liberty Insurance Corp. (Liberty) request review of the March 28, 2007 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

In Docket No. 1,031,646, it was undisputed claimant suffered an injury to her low back while lifting a resident on or about December 13, 2005. Claimant was provided medical treatment for those injuries and released to work with restrictions. In Docket No. 1,031,634, claimant alleged injuries to her back and lower extremities while moving patients on July 22, 2006. At the preliminary hearing on December 12, 2006, claimant sought additional medical treatment. Respondent had changed insurance carriers between the two dates of accident and the primary issue was whether or not the claimant sustained a new accident on July 22, 2006, or whether claimant's condition was the natural and probable consequence of her original injury on December 13, 2005.

The Administrative Law Judge (ALJ) entered an Order dated December 12, 2006, which designated a physician to proceed with a recommended diskography. But the ALJ took under advisement the issue whether claimant had suffered a new accident on July 22, 2006, pending an independent medical examination of claimant by Dr. Pat Do.

The respondent and Liberty referred claimant for an examination with Dr. Paul Stein on December 13, 2006. The parties stipulated to Dr. Stein's report of that examination being considered as part of the evidentiary record of the December 12, 2006 preliminary hearing. Dr. Do's independent medical report was filed with the ALJ on March 5, 2007, and a requested clarification letter from Dr. Do was filed on March 22, 2007.

The ALJ determined claimant suffered a new accidental injury on July 22, 2006, based upon the independent medical examiner's report.

Respondent and Liberty request review of whether the claimant's accidental injury on July 22, 2006, arose out of and in the course of employment and whether claimant's current condition is the direct and natural result of her December 2005 injury. Liberty argues claimant's injury on July 22, 2006, was a direct and natural consequence of the original injury as her pain never resolved after the December injury. And Dr. Stein opined that but for her preexisting degenerative disk disease she would not have suffered additional injury. Consequently, Liberty argues the Kansas Hospital Association WCF, Inc. (Kansas Hospital) bears the liability of providing medical treatment.

Respondent and Kansas Hospital argue the claimant suffered a new and separate injury on July 22, 2006, based upon the court-ordered independent medical examination. Therefore Liberty is responsible for the claimant's medical treatment and the ALJ's Order should be affirmed.

Claimant argues the ALJ's Order should be affirmed.

The issue for determination on this appeal from a preliminary order is whether claimant's condition and need for medical treatment is the result of a new and separate accident suffered July 22, 2006, or, in the alternative, a direct and natural result of the compensable injury claimant suffered on December 13, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

In Docket No. 1,031,646, respondent and Kansas Hospital admitted claimant's injury on December 13, 2005, is compensable. Kansas Hospital's coverage ended on December 31, 2005. In Docket No. 1,031,634, respondent and Liberty denied claimant's accidental injury on July 22, 2006, arose out of and in the course of employment.

On December 13, 2005, claimant and a CNA were lifting a resident off the floor when claimant injured her low back. Claimant was treated by Dr. Christopher P. Ceman and then later referred by Kansas Hospital to an orthopedic surgeon, Dr. David A. Benavides, due to pain in her low back, tail bone and legs. Dr. Benavides diagnosed a

compression fracture at the L3-L4 disk and prescribed pain medication, muscle relaxers and took claimant off work. On April 19, 2006, claimant was released to return to work with permanent restrictions. Those restrictions were no lifting greater than 50 pounds and when lifting patients it should involve a two person lift. Dr. Benavides determined claimant had reached maximum medical improvement even though claimant was still having occasional pain in her back, tail bone and legs as well as spasms upward to her neck.

Claimant testified she had not sought medical treatment between April 19, 2006, and July 22, 2006, but had contacted Dr. Benavides' office in May 2006 due to continued pain. Claimant received a letter from the doctor authorizing two physical therapy sessions which she did not attend.

On July 22, 2006, claimant was taking residents in and out of the dining room by assisting them while walking so they didn't fall. Claimant was hurried and noted she had to lift the patient's dead weight from the wheelchairs. At the conclusion of her shift she experienced an increase in pain down her back and into the tail bone as well as her legs. She testified the pain was worse than it had been. Claimant filled out an incident report the same day. She then sought medical treatment at the emergency room the following day after notifying her supervisor that she needed medical treatment.

Eventually, claimant was referred to Dr. Adeleke E. Badejo in Nebraska which was approved by Liberty. Dr. Badejo ordered an MRI and also recommended a diskogram. A diskogram was scheduled with Dr. Dennis McGowan but Liberty cancelled this appointment. Liberty then referred claimant to Dr. Fred Smith for a second opinion. Dr. Smith also recommended a diskogram. Both doctors agreed claimant should be taken off work.

Claimant testified that after she was released by Dr. Benavides in April 2006 she would have good days and bad days as she continued working.

Dr. Paul Stein examined claimant on December 13, 2006, at the request of respondent's counsel. Dr. Stein reviewed claimant's medical records and concluded that claimant suffered only increased symptoms but no structural change after the July 22, 2006 incident at work. Dr. Stein further opined:

> From a purely medical viewpoint, Ms. Wieland had an increase in her symptomatology from the lumbar spine on 7/22/06 but no structural alteration. This type of increase can be the result of minor activity in someone with preexisting and symptomatic degenerative arthritis. Although she is more symptomatic than she was prior to 7/22/06, the current situation is more a result of the natural and probable course of the degenerative disk disease than it is specifically to the work

> activity. Her current symptomatology would not have been caused by the work activity that she did on 7/22/06 but for the preexisting pathology.[1]

Conversely, the court ordered independent medical examiner, Dr. Do concluded that the MRI taken on August 10, 2006, showed a structural change at L5-S1 that was not present on the MRI taken on December 23, 2005. The doctor was specifically asked whether claimant's current complaints were a direct and natural consequence of the December 13, 2005 accident or whether she suffered an aggravation or new injury as a result of her work activities on July 22, 2006. The doctor opined the claimant suffered a new injury as a result of her work activities on July 22, 2006, and noted the most recent MRI revealed a diffuse bulge and focal tear in the annulus fibrosis as L5-S1. In contrast, the MRI taken after the December 2005 accident revealed no significant disk pathology at L5-S1.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[2], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.[3]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.[4]

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[1] Stipulation of Dr. Stein's Report Into Evidence, filed February 20, 2007.

[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[3] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[4] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied 265* Kan. 884 (1998).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[5], the Court attempted to clarify the rule:

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In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[6], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[7], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In *Logsdon*[8], the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. But whether an injury is a natural and probable result of previous injuries is generally a fact question.

In this case Dr. Do, the court ordered independent medical examiner, concluded that claimant suffered a new and distinct injury as demonstrated by the new findings revealed

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[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[8] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

on the MRI taken after the July 22, 2006 accidental injury. After she was released from treatment for the December 2005 injury the claimant returned to work and simply had good days and bad days as she continued working for approximately three months. But after the July 22, 2006 accidental injury the claimant complained of more extreme pain.

Liberty requests the Board to adopt the opinion of Dr. Stein that the progressive worsening of claimant's back condition was not related to her July 2006 accident but instead due to the natural progression of claimant's underlying degenerative disk disease. It is interesting to note that Dr. Stein agreed that claimant was more symptomatic after the July 2006 injury. Nonetheless, Dr. Stein simply attributed claimant's condition to aggravation of her underlying degenerative disk disease. And Dr. Stein did not attribute claimant's condition to her December 2005 accidental injury, instead he simply noted that accident had also aggravated her degenerative disk disease.

The ALJ reviewed the opinions of Drs. Stein and Do and concluded: "The report of the independent medical examiner established that Claimant suffered a new accidental injury on July 22, 2006. There is no evidence before the Court that the new injury was the natural and probable consequence of an earlier injury."[9]

This Board Member agrees and finds Dr. Do's opinion more persuasive in this case. Although claimant continued to have some pain complaints after she was released for treatment after the December 2005 accidental injury she returned to work and did not have additional medical treatment for approximately three months. She then suffered the July 22, 2006 injury which caused more intense pain. Dr. Do indicated that she had a structural change at L5-S1 which the MRI taken after the December accident did not reveal. Moreover, Dr. Benavides diagnosed a compression fracture at the L3-L4 after the December 2005 accidental injury and claimant's current condition appears to be the result of injury to a different level of her spine. This Board Member affirms the ALJ's decision that claimant's current condition is the result of a new and distinct injury suffered July 22, 2006.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

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[9] ALJ Order (Mar. 28, 2007).

[10] K.S.A. 44-534a.

[11] K.S.A. 2006 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated March 28, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2007.

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BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
James P. Wolf, Attorney for Respondent & First Liberty Ins. Corp.
Douglas A. Dorothy, Attorney for Respondent & Ks. Hospital Assoc. WCF, Inc.
Bruce E. Moore, Administrative Law Judge